IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION NO.4218 OF 2003

1. The Senior Inspector of Police,
Khadaki Police Station, Khadki,
Pune, District Pune.

2. The Senior Inspector of Police,
Nigadi Police Station, Nigadi,
Pune, District Pune.

3. The Commissioner of Police,
Commissioner's Office,
Pune City, Pune.

4. The State of Maharashtra,
Notice to be served upon the
Secretary to the Government
of Maharashtra, Home Department,
Mantralaya, Mumbai-400 032. .. Petitioners.
(Orig.Respondents)

v/s.

Shri Sudam Bhausaheb Bhalekar,
Government Service, R/o.Plot
No.629, Sector-28, Ganga Nagar
Pradhikaran, Akurdi,
Pune-411 044. .. Respondent
(Orig. Applicant)

Mr.S.R.Nargolkar, Assistant Government Pleader for the petitioners.

Mr.L.S.Gaikwad for the respondent.

CORAM : R.M. LODHA AND
R.S. MOHITE, JJ.

DATED : 1st April, 2005

ORAL JUDGMENT (Per R.M.Lodha,J.)

Sudam Bhausaheb Bhalekar-respondent herein was recruited as police constable in the police

department on 1.7.1970. He was promoted as head constable somewhere in the year 1982. In the month of May, 1993, he was attached to Khadki Police Station. On 28.5.1993, one complaint was made against him by Ramesh Babanrao Ranaware that he was demanding bribe for returning his tempo and its documents which had met with an accident. Based on that complaint, the trap was laid by Anti Corruption Department and he was trapped accepting illegal gratification. He was tried before the Special Court, Pune for the offence punishable under section 7 and 13 (1)(d) read with section 13(2) of the Prevention of Corruption Act. Upon conclusion of the trial, the Additional Sessions Judge, Pune vide his judgment and order dated 19.10.2001 convicted him for the offence punishable under the Prevention of Corruption Act and sentenced him to suffer rigorous imprisonment for six months and pay a fine of Rs.7,500/- and in default to suffer rigorous imprisonment for one month. The respondent having been convicted by the criminal court, the show-cause notice was issued to him on 16.1.2002 by the Disciplinary Authority as to why he should not be dismissed from service. By order dated 20.3.2002 issued by the Disciplinary Authority, the respondent was dismissed from service under clause (a) of the second proviso Article 311(2) of the Constitution of

India read with sections 25 and 26 of the Bombay Police Act and the Bombay Police (Discipline & Appeal) Rules, 1956.

2. To complete the narration of facts, we may notice here that the present respondent preferred appeal being criminal appeal No.916 of 2001 against the judgment and order dated 19.10.2001. The said criminal appeal was admitted. By the order dated 6.2.2002, the sentence awarded by the criminal court to the respondent was suspended by the High Court. It appears that by way of speaking to the minutes of the order dated 6.2.2002, the matter was again posted in the chamber of the learned Single Judge who passed the order on 6.2.2002 and vide order dated 30.4.2002, the learned Single Judge clarified the order dated 6.2.2002 by observing that by the said order, the order of conviction is also suspended.

3. The respondent challenged the order of his dismissal passed on 20.3.2002 by filing Original Application before the Maharashtra Administrative Tribunal (for short 'the MAT').

4. The MAT heard the parties and vide order dated 12.11.2002, set aside the order of dismissal. The

MAT ordered reinstatement of the respondent and awarded the backwages.

5. The petitioners have challenged the order of MAT dated 12.11.2002 by means of the present writ petition.

6. We heard Mr.S.R.Nargolkar, the learned AGP and Mr.L.S.Gaikwad, the learned counsel for the respondent and bestowed our thoughtful consideration to the matter.

7. The question that falls for determination by us is this: Whether by virtue of the order dated 30.4.2002 passed by the learned Single Judge of this court clarifying that by earlier order dated 6.2.2002 suspending the sentence, the order of conviction is also suspended, the order of dismissal dated 23.02.2002 passed in exercise of the power under clause (1) of the second proviso to Article 311(2) of the Constitution of India read with sections 25 and 26 of the Bombay Police Act is rendered invalid?

8. Article 311 of the Constitution of India deals with the dismissal, removal and reduction in rank of persons employed in civil service. Clause (a) of

the second proviso to Article 311(2) provides that the enquiry shall not be necessary where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge. In other words a civil servant convicted on a criminal charge is liable to dismissed without any further proceeding under Article 311(2).

9. Article 311 of the Constitution of India reads thus-

> **Art.311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.-** (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.
>
> (2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges [***]:
>
> [Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:
>
> Provided further that this clause shall not apply-]

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry;

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.]

10. Sections 25 and 26 of the Bombay Police Act to

the extent, those are relevant read thus-

"25(1) The State Government or any officer authorised under sub-section (2), in that behalf, may impose upon an Inspector or any member of the subordinate ranks of the Police Force, who in the opinion of the State Government or such authorised officer, is cruel, perverse, remiss or negligent in, or unfit for, the discharge of his duties, any one or more of the following penalties, namely-

.....

(f) dismissal which disqualifies for future employment in Government service:

(1-A) .....

(2) .....

(3) Nothing in sub-sections (1),(1-A) and (2)

(a) shall affect any Police Officer's liability to a criminal prosecution for any offence with which he may be charged; or

(b) shall entitle any authority subordinate to that by which the Police Officer was appointed, to dismiss or remove him.

26. Except in cases referred to in the second proviso to clause (2) of article 311 of the Constitution of India, no order of punishment under sub-section (1) of section 25 shall be passed unless the prescribed procedure is followed."

11. We may also have a look at section 389(1) of the Code of Criminal Procedure, 1973 at this stage.

It reads thus:

"**389. Suspension of sentence pending the appeal; release of appellant on bail.-** (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against the suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

12. Clause (a) of second proviso to Article 311(2) came up for consideration before the Supreme Court in the case of Deputy Director of Collegiate Education (Administration), Madras v. S.Nagoor Meera, (1995)3 SCC 377. The Supreme Court considered section 389 of the Code of Criminal Procedure, 1973 and its earlier decision in Rama Narang v. Ramesh Narang and ors., (1995)2 SCC 513

and construed this clause thus-

> "7. This clause, it is relevant to notice, speaks of 'conduct which has led his conviction on a criminal charge". It does not speak of sentence or punishment awarded. Merely because the sentence is suspended and/or the accused is released on bail, the conviction does not cease to be operative. Section 389 of the Code of Criminal Procedure, 1973 empowers the appellate court to order that pending the appeal "the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond". Section 389(1), it may be noted, speaks of suspending "the execution of the sentence or order", it does not expressly speak of suspension of conviction. Even so, it may be possible to say that in certain situations, the appellate court may also have the power to suspend the conviction- an aspect dealt with recently in Rama Narang v. Ramesh Narang. At pages 524 and 525, the position under Section 389 is stated thus: (SCC pp 524-525, paras 15 and 16)
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> > "Section 289(1) empowers the Appellate Court to order that the execution of the sentence or order appealed against be suspended pending the appeal. What can be suspended under this provision is the execution of the sentence or the execution of the order. Does 'order' in Section 389(1) mean order of conviction or an order similar to the one under Section 357 or Section 360 of the Code? Obviously the order referred to in Section 389(1) must be an order capable of execution. An order of conviction by itself is not capable of execution under the Code. It is the order of sentence or an order awarding compensation or imposing fine or release on probation which are capable of execution and which, if not suspended, would be required to be executed by the authorities.
> >
> > In certain situations the order of

> conviction can be executable, in the sense, it may incur a disqualification as in the instant case. In such a case the power under Section 389(1) of the Code could be invoked. In such situations the attention of the Appellate Court must be specifically invited to the consequence that is likely to fall to enable it to apply its mind to the issue since under Section 389(1) it is under an obligation to support its order 'for reasons to be recorded by it in writing'. If the attention of the Court is not invited to this specific consequence which is likely to fall upon conviction how can it be expected to assign reasons relevant thereto?... If such a precise request was made to the Court pointing out the consequences likely to fall on the continuance of the conviction order, the Court would have applied its mind to the specific question and if it thought that case was made out for grant of interim stay of the conviction order, with or without conditions attached thereto, it may have granted an order to that effect."

> 8. We need not, however, concern ourselves any more with the power of the appellate court under the Code of Criminal Procedure for the reason that what is relevant for clause (a) of the second proviso to Article 311(2) is the 'conduct which has led to his conviction on a criminal charge" and there can be no question of suspending the conduct. We are, therefore, of the opinion that taking proceedings for and passing orders of dismissal, removal or reduction in rank of a government servant who has been convicted by a criminal court is not barred merely because the sentence or order is suspended by the appellate court or on the ground that the said government servant-accused has been released on bail pending the appeal."

13. The Supreme Court in S.Nagoor Meera held in clear words that relevant aspect that is required

to be seen under clause (a) of the second proviso to Article 311(2) is the "conduct which has led to his conviction on a criminal charge" and there can be no question of suspending the conduct. That being the legal position, in our considered view there is no impediment for the Disciplinary Authority to take proceedings for and order dismissal, removal and reduction in rank of a Government servant who has been convicted by a criminal court even where the sentence or order of conviction is suspended by the appellate court by invoking clause (a) of second proviso to Article 311(2).

14. The Constitution Bench of the Supreme Court recently in the case of K.Prabhakaran v. P.Jayarajan, (2005)1 SCC 754 held that a person convicted may have filed an appeal. He may have secured an order suspending execution of sentence or the order appealed against under section 389 of the Code of Criminal Procedure, 1973. What is suspended is not the conviction of sentence; it is only the execution of the sentence or order which is suspended. It is suspended and not obliterated.

15. In K.Prabhakaran, the Constitution Bench of the Supreme Court referred to the decision given by

the earlier Constitution Bench in the case of B.R.Kapur v. State of T.N. and anr. (2001)7 SCC 231. In B.R.Kapur it was held thus-

> "40. In much the same vein, it was submitted that the presumption of innocence continued until the final judgment affirming the conviction and sentence was passed and, therefore, no disqualification operated as of now against the second respondent. Before we advert to the four judgments relied upon in support of this submission, let us clear the air. When a lower court convicts an accused and sentences him, the presumption that the accused is innocent comes to an end. The conviction operates and the accused has to undergo the sentence. The execution of the sentence can be stayed by an appellate court and the accused released on bail. In many cases, the accused is released on bail so that the appeal is not rendered infructuous, at least in part, because the accused has already undergone imprisonment. If the appeal of the accused succeeds the conviction is wiped out as cleanly as if it had never existed and the sentence is set aside. A successful appeal means that the stigma of the offence is altogether erased. But that is not to say that the presumption of innocence continues after the conviction by the trial court. That conviction and the sentence it carries operate against the accused in all their rigour until set aside in appeal, and a disqualification that attaches to the conviction and sentence applies as well.
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> "44. Lastly, in this connection, our attention was drawn to the case of Vidya Charan Shukla v. Purshottam Lal Kaushik. The Court held that if a successful candidate was disqualified for being chosen, at the date of his election or at any earlier stage of any step in the election process, on account of his conviction and sentence exceeding two years' imprisonment, but his conviction and sentence were set aside and he was acquitted on appeal before the

> pronouncement of the judgment in the election petition pending against him, his disqualification was retrospectively annulled and the challenge to his election on the ground that he was so disqualified was no longer sustainable. This case dealt with an election petition and it must be understood in that light. What it laid down does not have a bearing on the question before us: the construction of Article 164 was not in issue. There can be no doubt that in a criminal case acquittal in appeal takes effect retrospectively and wipes out the sentence awarded by the lower court. This implies that the stigma attached to the conviction and the rigour of the sentence are completely obliterated, but that does not mean that the fact of the conviction and sentence by the lower court is obliterated until the conviction and sentence are set aside by an appellate court. The conviction and sentence stand pending the decision in the appeal and for the purposes of a provision such as Section 8 of the Representation of the People Act are determinative of the disqualifications provided for therein."

16. The three Judge Bench of the Supreme Court in M/s.Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association, Madras, AIR 1992 SC 1439 had on an occasion to consider the effect of an interim order and it was held that by the interim order the existence of the order that has been stayed is not wiped out.

17. The legal position with regard to clause (a) of the second proviso to Article 311(2) vis-a-vis the order of the appellate court under section 389(1) of the Code of Criminal Procedure, 1973

seems to us is that by the order of suspension of sentence or the order appealed against, the execution of the sentence or order appealed against is suspended but it is not obliterated or wiped out. Such order of conviction despite the order of suspension of its execution remains in existence. Moreover, for the purposes of clause (a) of second provision of Article 311(2) of the Constitution of India what is pertinent and relevant is the conduct which led to the delinquent's conviction on a criminal charge. The suspension of sentence or order would not affect the applicability of clause (a) of second proviso of Article 311(2) because the conduct which led to the delinquent's conviction on a criminal charge does not result in suspending the conduct. The conviction of the employee for the purposes of clause (a) of second proviso to Article 311(2) is determinative of the disciplinary action provided for therein. The pendency of appeal against the conviction and sentence and during that suspension of sentence and/or conviction thereof does not take away the applicability of clause (a) of second proviso to Article 311(2). The disqualification that attaches to the Government employee on his conviction and award of sentence does not cease to be operative because the order of conviction is appealed against and the sentence or

for that matter conviction remain suspended during the pendency of appeal. However, if in appeal acquittal takes place, such acquittal in appeal takes effect retrospectively and wipes out the sentence and the conviction of the criminal court. On clear acquittal what it implies is that the conduct of a delinquent which led to his conviction on a criminal charge on acquittal in appeal is completely obliterated.

18. We now turn to the facts of the present case. On 6.2.2002, the learned Single Judge of this court passed the following order:

> "Counsel for the applicant prays for suspension of sentence granted. Application disposed of."

The Disciplinary Authority invoked the provision contained in clause (a) of second proviso to Article 311(2) of the Constitution of India read with sections 25 and 26 of the Bombay Police Act as the delinquent was convicted by the criminal court of the offence punishable under the Prevention of Corruption Act vide judgment and order dated 29.10.2001. On that date, there was no impediment or bar for the Disciplinary Authority to invoke clause (a) of Article of the second proviso to Article 311(2) of the Constitution of India and

sections 25 and 26 of the Bombay Police Act. The situation did not alter in law on passing of the order by the learned Single Judge on 30.4.2002.

The order dated 30.4.2002 reads thus:

> "The matter is on board for speaking to the Minutes of order passed by me on 6.2.2002. On that day counsel for the applicant-appellant prayer for suspension of sentence. The prayer was granted and Criminal Application No.381 of 2002 was disposed of.
>
> Counsel for the applicant-appellant states that on that day he had prayed for suspension of conviction or at any rate he wants his prayer to be considered for suspension of conviction. Notice was given to the learned APP for today. Counsel for the accused has got proof with him. Nobody is present. Accused is likely to loose his job if the conviction is no suspended. Since the appeal is admitted and looking to the facts his conviction is suspended and the order dated 6.2.2002 is clarified accordingly. Criminal Application No.1435 of 2002 is disposed of."

Even if by order dated 30.4.2002, the learned Single Judge stayed the order of conviction, its legal effect was that execution of the order dated 29.10.2001 stood suspended. By the order dated 30.4.2002, the order of conviction did not cease to be in existence. The order of conviction passed by the criminal court remains in existence pending appeal and is not obliterated or wiped out by suspending its execution. In the words of the Supreme Court in the case of S.Nagoor Meera, for

clause (a) of second proviso to Article 311(2) what is relevant is the conduct which led to the conviction of the delinquent on a criminal charge and there can be no question of suspending the conduct.

19. In the case of K.C.Sareen v. C.B.I., Chandigarh, AIR 2001 SC 3320 the Supreme Court expressed its concern about corruption by public servants and observed thus-

> "11. Corruption by public servants has now reached a monstrous dimension in India. Its tentacles have started grappling even the institutions created for the protection of the republic. Unless those tentacles are intercepted and impeded from gripping the normal and orderly functioning of the public offences, through strong legislative, executive as well as judicial exercises the corrupt public servants could even paralyse the functioning of such institutions and thereby hinder the democratic polity. Proliferation of corrupt public servants could garner momentum to cripple the social order if such men are allowed to continue to manage and operate public institutions. When a public servant was found guilty of corruption after a judicial adjudicatory process conducted by a Court of law, judiciousness demands that he should be treated as corrupt until he is exonerated by a superior Court. The mere fact that an appellate or revisional forum has decided to entertain his challenge and to go into the issues and findings made against such public servants once again should not even temporarily absolve him from such findings. If such a public servant becomes entitled to hold public office and to continue to do official acts

> until he is judicially absolved from such findings by reason of suspension of the order of conviction it is public interest which suffers and sometimes even irreparably. When 'a public servant who is convicted of corruption is allowed to continue to hold public office it would impair the morale of the other persons manning such office, and consequently that would erode the already shrunk confidence of the people in such public institutions besides demoralising the other honest public servants who would either be the colleagues or subordinates of the convicted person. If honest public servants are compelled to take orders from proclaimed corrupt officers on account of the suspension of the conviction the fall out would be one of shaking the system itself. Hence, it is necessary that the Court should not aid the public servant who stands convicted for corruption charges to hold only public office until he is exonerated after conducting a judicial adjudication at the appellate or revisional level. It is a different matter if a corrupt public officer could continue to hold such public office even without the help of a Court order suspending the conviction."

20. The Supreme Court emphasised that where a public servant is held guilty of corruption by a competent court of law, he should be treated as corrupt until he is exonerated by the superior court and merely because the appellate or revisional forum has entertained the challenge to the judgment and order of the lower court, such public servant should not be temporarily absolved from such judgment and order.

21. From what we have discussed above, we find that the judgment of the Maharashtra Administrative Tribunal is legally erroneous and unsustainable.

22. We, accordingly, allow the writ petition and set aside the judgment dated 12.11.2002 passed by the Maharashtra Administrative Tribunal, Mumbai. The original application No.602 of 2002 stands dismissed. No costs.

23. Oral prayer made by the learned counsel for the respondent for stay of this order is rejected.

(R.M. LODHA, J.)

(R.S. MOHITE, J.)